

Episode 15: Informational Episode on the Circuit Split on Due Process in Title IX Cases

Courtney Bullard:

Welcome to episode 15 of The Law and Higher Ed Podcast. My name is Courtney Bullard, your host. I'm an 18-year practicing attorney who specializes in compliance with Title IX and related laws and regulations. I partner with institutions in their compliance efforts as special counsel on Title IX matters or conducting Title IX training. I also regularly serve as an external investigator and expert witness in litigation. This podcast is a quick informational episode where I'm going to dive into what we are seeing out of the courts on what constitutes due process or a fair hearing for a student accused of sexual misconduct. First things first though, I want to highlight some exciting things coming down the pike for ICS. This month is a webinar for athletics, be sure to tune in because I have a guest presenter and an exciting announcement. Next month, we're presenting a webinar for Title IX coordinators and then, drum roll, please, in December, we are doing our prelaunch for Title IX University. Be on the lookout for informational webinars with awesome early bird discounts through December.

Courses will roll out January 9th. Why Title IX U? Well, a large part of my business is providing in person training and ICS also regularly puts on training or conferences. The majority of the time, my audience is a mixture of new professionals and seasoned professionals. For the new professionals, they tell me they're drinking from a fire hose and all the information that they need to know is overwhelming. They're often walking into a conference with little to no knowledge of the foundation for Title IX, just that they are now going to be involved in it for their campus in some capacity, wouldn't it be great to have taken a course before walking into a large conference so that you can feel confident in your knowledge of title IX? I also run into the busy seasoned professional that struggles to make those in-person conferences and everything in between. What is Title IX U? It is compliance at your fingertips. The ability to take one online course, build a course curriculum tailored to your needs or to become a subscriber that will give you unlimited access to new courses added regularly.

These are self paced, interactive content rich courses, led by attorneys and subject matter experts. Our inaugural course is Title IX 101, with many more to follow. So stay tuned for all of that and more, yes, a conference from ICS as well, and be sure to connect with us on all of our social media platforms. I just added Instagram and we also have a new Facebook group for K through 12 Title IX coordinators based on feedback I've gotten from these folks who need more avenues for collaboration. One more note about Title IX U, the NPRM is set to drop any day. Of course, none of us know exactly when, but rest assured if you get in on the early bird discount for the first courses offered by Title IX U, you will also have access to courses regarding the NPRM and how to ensure your university stays in compliance. All right, let's get started.

The wild, wild West, just one description of the current state of Title IX litigation, because it is hard to predict how a federal court will rule and a Title IX cause of action. The first thing that I want to explain is what I mean by Title IX litigation, a cause of action brought under Title IX can be brought under three theories, erroneous outcome, archaic assumptions and deliberate indifference. I am not going to dive into an explanation of these theories, but we'll note that we typically see a deliberate indifference argument by a complainant plaintiff and an erroneous outcome argument by a respondent plaintiff, which is to clarify the plaintiff is the individual who brings the lawsuit. But that is certainly not a hard

and fast rule. For purposes of this informational, I want to focus on this circuit split we're seeing on the issue of whether due process and a sexual misconduct matter requires a live hearing and an ability for cross examination. In 2018, the sixth circuit came down with a significant ruling in this area providing for expansive due process rights in Title IX cases.

Note that the sixth circuit includes Kentucky, Michigan, Ohio, and my State, the great State of Tennessee. In *Doe v. Baum*, the sixth circuit ruled that when credibility is at issue, a public university must give the accused student or his agent an opportunity to cross examine the accuser an adverse witness in the presence of a neutral fact finder. This ruling calls into question the single investigator model used by many educational institutions and has caused public institutions within these States to reconsider their Title IX policies and procedures. In *Doe*, the University of Michigan conducted an investigation into an allegation that Doe committed sexual assault at a fraternity party by having sex with a female student who reported she was too drunk to consent. The investigation consisted of interviewing 25 witnesses. Because the witness statements conflicted in many situations, the investigator's report did not support a finding of misconduct. On appeal, the appeals board reversed finding that the claimant and her witnesses were more credible.

While the university deliberated sanctions, Doe who was the respondent in the campus case, withdrew and filed a lawsuit, alleging the university violated his constitutional due process rights by failing to provide him with a hearing and ability to cross examine witnesses. He also alleged Title IX violations under the three theories I discussed earlier. In analyzing the university's investigatory process for the due process claim, the court made a few significant findings. Number one, offering students an opportunity to respond with written statements is not a sufficient replacement for a live hearing or the ability to cross examine witnesses. Number two, only under limited circumstances, is it appropriate to deny these procedures and that is when the determination does not rely on testimonial evidence at all, or if the respondent admits to misconduct. In essence, if a university is faced with conflicting or competing narratives about potential misconduct, the administration must facilitate some form of cross examination.

The court also applied this reasoning to Doe's erroneous outcome claim. Stating that because he alleged that the university did not provide for an opportunity to cross examine, he pled facts sufficient to cast some articulable doubt on the accuracy of the proceedings' outcome. So in most instances, I know for example with my clients, colleges have changed their process to align with this ruling. What does alignment mean? Well, the court left a host of unanswered questions in its ruling. Who is appropriate to conduct a cross examination, how will the cross examination be conducted, for example. It also did not define the scope of the hearing or other adversarial processes required. As we know that prior case law has concluded that full-scale adversarial hearings for school disciplinary proceedings are not required to satisfy due process. Finally, the ruling questions the continued use of the single investigator model, thus public institutions in these States, who stay with the single investigator model are at a high risk of adverse findings and due process in Title IX, erroneous outcome claims.

It is noteworthy that while the due process aspects of the *Doe* decision are limited to public universities, the erroneous outcome holding would apply to both public and private institutions. Thus, all institutions within the sixth circuit should consider the implication of these rulings on the policies and procedures at their school. In comes *Hadik versus University, Massachusetts Amherst*, in August of 2019, a first circuit ruling that rejects many of *Baum's* findings. The first circuit includes the States of Maine,

Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. And this court found that there was sufficient due process and an inquisitorial system where the accused submitted questions to a panel and the panel was responsible for questioning. In this decision, the court did strengthen the due process requirements applicable to discipline at State universities. Here, there was a physical altercation between two students on a study abroad trip. A no contact order was issued during the institution's investigation, despite the no contact order, the parties continued to have frequent consensual contact and maintained a relationship.

The university issued another charge against Hadik, the respondent in this case, for harassment and breaking the no contact order as a result of the continued contact and suspended him without further investigation, Hadik with jury, once it became clear the university was not going to schedule a hearing. The university did eventually convene a hearing panel consisting mainly of students and the complainant was present and had participated by phone. Neither Hadik nor his attorney were allowed to cross examine the complainant directly. They were able to submit questions to the hearing panel in advance and the Dean who was the chair of the panel withheld 20 out of the 36 proposed questions. The panel questioned both parties three times, ultimately Hadik was found not responsible for the more serious charges, but found responsible for the physical assault and violating the no contact order. And as a result, he was expelled.

With respect to the interim or summary suspension, the court ruled in Hadik's favor because he had no chance to challenge his suspension before it was imposed. Note that the court found that while it can be permissible in exigent circumstances to impose a summary suspension, that was not present here because the university had waited 13 days before suspending him. The court found that even though Hadik had a chance to be heard two days after suspension, that was too late. Ultimately, he was suspended for what turned out to be five months with an attempt to investigate whether the school was warranted in suspending him or not. Hadik had less success in challenging the hearing process, leading to his expulsion as a violation of due process. The court understood this process as more like an inquisitorial system used in civil law jurisdictions and some administrative matters, in that context, the court did not view direct cross-examination as essential to due process. It was particularly skeptical that cross examination by students would assist the truth finding endeavor.

Although it recognized that benefits of examination by trained lawyers may be helpful, the court did not want to mandate many courtrooms with active participation of counsel. The court did require some mechanism for confronting the complaining witness and probing his or her account. Notably, the court agreed with fire's position that due process must include an opportunity for real time cross examination, even if only through a hearing panel. But refuse to go as far as the sixth circuit requiring in-person cross examination by a party or his or her representative in order to satisfy due process where witness's credibility is at issue. Instead, the court held that if a public university denies a student, the ability to directly question witnesses, it must ensure reasonably adequate questioning before the fact finder that reasonably probes, the testimony tendered against the accused. While Hadik did not prevail on this issue, schools within the first circuit should be evaluating their processes. It's unclear if a single investigator model is acceptable under this ruling, but certainly it will be challenged if a party believes that the investigator failed to probe witness accounts sufficiently.

I would be remiss if I did not note a March 2019 case out of California, where respondents sought to overturn his expulsion from USC after he was found to have engaged in non consensual sex in

violation of the school's code of conduct. The court held that when a student is accused of sexual misconduct and facing serious disciplinary sanction, such as expulsion or suspension and where the credibility of witnesses is central, a fair process must include a live hearing where parties may cross examine each other, either in person or through such means as video conferencing. The court also found that the person who investigates the case cannot also decide whether the allegations are true. This case involved a private school, but to find requirements for a "fair hearing" language often used in court cases in place of due process, when allegations are brought up by a private institution. At the end of the day, both the first and sixth circuit are requiring some sort of cross examination, although, what is sufficient certainly differs.

And then the State of California is requiring some sort of live hearing, which I know most institutions in that jurisdiction have changed their processes as a result, or are working towards those goals. Remember as I'm sure, none of you have forgotten that the NPRM, the notice of proposed rule making, is also looming out there. And this notice was issued by the department of education last year, and explicitly rejects the single investigatory model, it's much more aligned with the sixth circuit ruling. September has come and gone and while there's rumor of a November release date, the reality is that no one really knows. If the NPRM conflicts with these decisions or others across the country, we will no doubt see chaos and sue in Title IX compliance around the country. My recommendations to private schools outside of California, in the first and sixth circuit is to still begin prepping for a sea of change and what it would look like to begin live hearings and the elimination of the single investigator model for your campus.

There's a lot happening in Title IX litigation and this overview is just that, an overview of some of the significant rulings addressing due process rights of the accused. There is so much more to come. For an in depth overview of all that has happened, be sure to tune into my 2019 year end review webinar that will be in January as I have every year, that's free. And also of course, look to Title IX U, where there will be a 2020 legal updates course that you can enroll in as well. Thanks so much for tuning into The Law and Higher Ed Podcast and listening to each and every episode. Just so you know, episodes are generally released every other Thursday, but sometimes life gets in the way or strep throat and we miss a Thursday. As we come to the conclusion of 2019, which is hard to believe, just know that we might be replaying some older episodes that were favorites.

I know many of you have started listening to The Law and Higher Ed Podcast here in the past few weeks, so we're going to replay some favorites, but I've got a great lineup of guests starting in January. One is a new addition to the ICS team that I know you guys are going to really love. We're also talking about a guest to discuss LGBTQ community and unique considerations in Title IX matters. And we're going to talk about kink culture, I have a plaintiff's attorney, very well known plaintiff's attorney who will be joining me as well and much more. And of course, if the NPRM drops between now and January, you will see an informational episode get released pretty quickly on the podcast. If you're enjoying it, please share, like, rate, subscribe, all the things to the podcast. Also, please connect with me on all the social media platforms. Instagram is a new platform for us, and it's been a really fun way to get information out. So if you're on Instagram, please look for me there.

We've always had a Facebook page, but we've really built that out as well and have added some private groups, one for Title IX coordinators, one for K through 12, Title IX coordinators. So please also feel free to request to join those in order to meet and collaborate with other professionals. I'm on the

road a lot these next two months, I will be going to California to talk at the 2019 grand river solutions conference. If you're going to be there, please come and introduce yourself. I love meeting my listeners in person and I will be speaking with Natasha Baker and also Scott Schneider, who was a guest on the podcast early on. Jody Shipper who runs Grand River Solutions will be a guest on the podcast as well in the new year, so please stay in touch, keep listening. And if you are going to be at the conference, I would love to meet you in person. Thank you guys so much again for listening and until next episode.

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